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In the

Supreme Court of the United States

October Term, 1970.

No. 1146.

SAUL STAMBLER and ROSE STAMBLER, individually, and SAUL STAMBLER on behalf of Personal Operation Co., Inc., and Enrum Park Inc., and ROSE STAMBLER on behalf of Enrum Park Inc. (a defunct corporation),

Petitioners,

against

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

Respondents.

Brief and Appendix of the Title Guarantee Company, John C. O'Malley and County Dollar Corporation in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

JOHN J. BOYLE,
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In the

Supreme Court of the United States

October Term, 1970

Docket No. 1140

SAUL STAMBLER and ROSE STAMBLER, individually and SAUL STAMBLER on behalf of Prudential Operating Co., Inc. and Empire Pool, Inc., and ROSE STAMBLER on behalf of Empire Park, Inc. (a defunct corporation),

Petitioners,

against

JOSEPH J. DUGGAN, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASSERS, DAVID AVSTREICH, LEONARD WEISS, MURRAY FISHEL, GEORGE B. GORDON,

Respondents.

Brief on Behalf of Defendants-Respondents, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation in Opposition to an Application for a Writ of Certiorari.

Statement.

This is an application for a writ of certiorari by the plaintiffs Stambler. They desire to appeal from:

1. A judgment of Hon. William B. Herlands, United States District Judge entered June 23, 1969, dismissing plaintiffs' amended complaint for failure to state a cause of action against any of the defendants (B.5)*;

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*Letters and numbers in parentheses are to pages of Petitioners' Appendix and Respondents' Appendix hereto annexed except as otherwise noted.

2. An order of Hon. Inzer B. Wyatt, United States District Judge dated October 24, 1963, denying plaintiffs' motion to amend Judge Herlands' judgment of June 28, 1963, to permit the service by plaintiffs of a second amended complaint. (R 133);

3. An order of Hon. Inzer B. Wyatt, United States District Judge, dated December 1, 1963, denying plaintiffs' motion to re-argue the motion for leave to serve a second amended complaint; and,

4. An order and judgment of the United States Court of Appeals, Second Circuit, affirming the judgment of dismissal of Judge Herlands and post judgment orders (R 138).

Issues Presented Herein.

1. Does plaintiffs' amended complaint state a claim against defendants upon which relief can be granted?

2. On the record before the Court are plaintiffs entitled to leave to serve a second amended complaint herein?

3. On the record before the Court are the defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation, entitled to summary judgment dismissing plaintiffs' amended complaint on the merits?

4. Does the Court have subject matter jurisdiction herein?

5. Does the Court have in personam jurisdiction herein?

Statement of the Case.

It seems to appear from the amended complaint in this action (C-1) that it is brought to recover a judgment (a) declaring that the Judgment entered April 22, 1963

in the Supreme Court, Westchester County, New York, in the actions of Wasylee v. Stambler (Action No. 1), Prudential v. Wasylee (Action No. 2), and County Dollar Corporation v. Empire Park, Inc. (Action No. 3) enumerated in Exhibit 1 (C 53) annexed to answer herein (C 46) of defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation, to be a nullity; (b) for a permanent injunction enjoining the enforcement of the State Court's judgment; and (c) for the recovery of astronominal damages against all of the defendants.

As far as can be ascertained from the allegations of the amended complaint (C 1) the basis for such relief is that the defendants corruptly conspired in the State Court actions in the Supreme Court, Westchester County with Mr. Justice John J. Dillon, before whom said consolidated actions were tried, to obtain an improper judgment, which violated plaintiffs' civil and constitutional rights under Title 28 U.S.C. Sections 1331, 1332, 1343, 2201 and 2202; Title 42 U.S.C. Sections 1981, 1982, 1983, 1985, 1986 and 1994, and the Constitution of the United States, in particular, Article 1 Section 10 and also under the Fifth, Sixth, Thirteenth and Fourteenth Amendments thereto.

There is no merit to plaintiffs' claims herein. The facts showing the lack of merit are fully and completely set forth in the affidavits of John C. O'Malley and Herman Berniker, sworn to December 12, 1968 (4a and 23a) submitted in support of the motion for summary judgment and other relief returnable January 14th, 1969, made by The Title Guarantee Company, John C. O'Malley and County Dollar Corporation (1a). For such reason said facts are not set forth here for a second time and reference is hereby made to the aforesaid affidavits and Exhibits therein referred to for a detailed analysis of what

transpired in the proceedings in the State Court that purportedly are plaintiffs' basis for this action and application.

With these facts in mind, it is clear that plaintiffs have failed to state in their amended complaint and in fact have no cause of action in the United States Courts against the defendants in this action.

POINT I.

The present application for a writ of certiorari does not come within the purview of Rule 19 of this court.

POINT II.

The amended complaint does not state a cause of action against any of the defendants.

Judge Herlands in his opinion (R-5) dismissing plaintiffs' amended complaint, analyzed said complaint in detail and applied and set forth in full all applicable authorities showing that said complaint failed to state a claim against any of the defendants.

It would serve no useful purpose here to burden this Court with a re-analysis of said complaint and a restatement and re-application of the controlling authorities relied upon and set forth by Judge Herlands in his opinion.

It is submitted for the reasons and upon the law set forth in Judge Herlands opinion (R-5) that plaintiffs' amended complaint was properly dismissed for failing to state a cause of action against the defendants.

POINT III.

Plaintiffs' application to amend Judge Herlands opinion and judgment entered June 23, 1969, so as to permit the service of a second amended complaint, was properly denied on the facts and the law.

Plaintiffs' motion to amend Judge Herlands opinion and judgment of June 23, 1969 was pending before Judge Herlands at the time of his death. The motion was properly denied by Judge Wyatt, to whom it was referred by order of the Chief District Judge.

In denying this motion Judge Wyatt reviewed all of the proceedings before Judge Herlands as well as before the other judges of this Court. His opinion (B-13) makes this clear. After such review he concluded (B-18):

> "The present motion is supported only by arguments already rejected by Judge Herlands.
> The motion is denied on the law and in the exercise of discretion."

Judge Wyatt's conclusion is amply supported by the facts. Plaintiffs' motion for leave to amend Judge Herlands' judgment and for permission to serve a third complaint was brought on solely by notice of motion dated June 30, 1969. The notice of motion is not supported by an affidavit or any factual showing of any kind, that plaintiffs, if given an opportunity, were able to state a claim against defendants in a second amended complaint. Plaintiffs have never stated facts or attempted to state facts showing that they have a claim to be alleged in a second amended complaint. Absent such showing, they are not entitled to any further leave to amend.

Under such circumstances plaintiffs do not bring themselves within the ruling of *Foman v. Davis*, 371 U. S. 178 (1962), 9 L. Ed. 2d 222, on which they relied below. In

stead they fall squarely within the provisions of such decision prohibiting the granting of leave to further amend in a case like this. Here it is apparent that the application is made in bad faith after repeated failure to cure obvious deficiencies and, where permission to amend would be futile as the record here shows, and would cause defendants undue prejudice. In *Foman v. Davis* (371 U. S. 178), the Court said at page 182 of its opinion:

> "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, *futility of amendment, etc.*—the leave sought should, as the rules require be 'freely given.'" (Italics added.)

Petitioners have not shown here that they can state facts in a second amended complaint establishing the purported conspiracy which they claim. The futility of permitting further amendment is shown by this brief and the affidavit of John C. O'Malley (4a). The District Court was therefore right in denying further leave to amend on the facts of this case. Therefore, its ruling should not be disturbed, and certiorari should be denied. This is inherent in the ruling in *Foman v. Davis*, (371 U. S. 178) where the court said at page 182 of its opinion:

> "Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave *without any justifying reason appearing for the denial is not in exercise of discretion;* it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." (Emphasis added.)

The justifying reasons for denying plaintiffs leave to further amend were clearly stated by Judge Herlands in

his decision and judgment of June 23, 1969 (B-5). He said (B-12):

> "Plaintiffs' suit is unfounded and has probably been maintained in bad faith. Plaintiffs accuse defendants with participation in a fraud and conspiracy but have submitted an amended complaint which in no way sets forth in a legally sufficient manner the existence of any wrongdoing on the part of defendants despite the fact that leave had been granted for amendment of the original complaint *to supply that deficiency. Plaintiffs were apparently fully aware that they had no facts with which they could support their reckless accusations.*" (Emphasis added.)

Referring to Judge Tenney's order granting plaintiffs leave to file an amended complaint, Judge Herlands said (B-12):

> "Although plaintiffs' action *may very well in fact have been frivolous and vexatious*, a district judge applying the rules of procedure, granted plaintiffs leave to file an amended complaint. Where this is done, it would be unfair to penalize a litigant by taxing him with attorneys' fees whenever the amended complaint fails to withstand a motion to dismiss for failure to state a claim. *Although this litigation is indeed baseless*, it has not been so unconscionably oppressive and harassing to warrant the harsh sanctions sought by defendants." (Italics added.)

The foregoing constitute ample grounds under *Foman v. Davis, (supra)*, to deny plaintiffs leave to further amend herein and plaintiffs' motion for such relief and to re-argue were properly denied.

POINT IV.

On the record herein defendants are entitled to summary judgment dismissing plaintiffs' amended complaint on the merits and it clearly appears therefrom that plaintiffs cannot state a cause of action against defendants.

The application resulting in Judge Herlands' opinion and judgment entered June 23, 1969 dismissing plaintiffs' complaint was initiated by notice of motion of the defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation dated December 12, 1968 (1a), and the supporting affidavits of John C. O'Malley and Herman Berniker both verified December 12, 1968, (4a, 23a) asking for summary judgment against plaintiffs on the merits and for other relief. The notice of motion and supporting papers were served on plaintiffs on December 12, 1968 and were returnable in the District Court on January 14, 1969. Notwithstanding this long notice of motion, plaintiffs elected not to submit a single paper in opposition to said motion for summary judgment on the merits. Instead they filed a frivolous affidavit imputing prejudice to Judge Herlands.

The said motion papers factually show that there was no conspiracy between the defendants to deprive plaintiffs of any of their rights, civil, constitutional or otherwise. Exhibits 2, 3 and 4 made a part of the motion papers and consisting of the record and briefs in the State Court action in the Appellate Division of the Supreme Court also factually demonstrates that plaintiffs had a fair trial before Judge Dillon and that there was no conspiracy of any kind to deprive plaintiffs of their rights. This factual proof is nowheres contraverted or denied. It stands admitted in the record herein, and entitles defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation, to summary judgment

herein dismissing plaintiffs' amended complaint on the merits. It further shows that plaintiffs cannot state a claim against defendants, and it would be futile to permit further amendment.

POINT V.

No federal question conferring jurisdiction on the Federal Court is involved in this action.

The amended complaint alleges in paragraph "First" thereof (C-1):

> "First: The jurisdiction of this Court over this complaint arises under Title 28 U.S.C., Sections 1331, 1332 and 1343, 2201 and 2202; Title 42 U.S.C., Sections 1981, 1982, 1983, 1985, 1986, 1994; the Constitution of the United States and in particular, Article 1, Sec. 10, and the Fifth, Sixth, Thirteenth and Fourteenth Amendments, thereto."

Judge Herlands in his opinion dismissing the amended complaint (B-5) analyzed the complaint with respect to each of the foregoing sections and the foregoing provisions of the Constitution. He demonstrated both factually and as a matter of law clearly and convincingly that none of such sections and provisions had any application here. This took all possible federal questions out of the case.

It clearly appears from defendants' motion papers (4a, 23a), exhibits and the amended complaint and answer (C-46) that the consolidated actions in the State Court did not arise under the Constitution or any of the laws of the United States. It involved only a determination of title to a gore strip of real property in Westchester County and the right of Wasylee in that action to recover back from the Stamblers and their corpo-

rations on the ground of fraud, the purchase price paid by Wasylec for a conveyance by Prudential Operating Co., Inc. of a portion of said gore strip.

The present action in this Court is solely to relitigate the very issues litigated in the State Court. Jurisdiction to do this cannot be conferred on the Federal Courts by the bald statements made in the amended complaint that plaintiffs' constitutional and civil rights were violated in the trial of the State Court action.

> 1 U.S.C.A. Title 28, Section 1331;
> *Morgan v. Sylvester*, 125 F. Supp. 380 (S. D. N. Y. 1954); aff'd 220 F. 2d 758 (2d Cir. 1955), cert. den. 350 U. S. 867;
> *Wells v. Universals Pictures Co.*, 166 Fed. Rep. 2d 620 (CCA 2d 1948), 621, 622;
> *Powell v. Workmens' Compensation Board of State of New York*, 327 F. 2d 131, 137-138;
> *Jemzura v. Belden*, 281 F. Supp. 200, at 206;
> *Pierson v. Ray*, 386 U. S. 547.

In *Morgan v. Sylvester (supra)*, decided by Judge Weinfeld, the Court said at page 387 of its opinion:

> "This action is a clear attempt, despite plaintiff's assertion to the contrary, to obtain a review and a retrial of the State Court proceedings. The fact that a defeated litigant is prepared to charge a 'conspiracy' recklessly or otherwise or recite *in haec verba* the language of the Civil Rights Act does not give a right of review in the Federal Courts. To uphold the claim here advanced upon such conclusory allegations 'would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision.'"

The Federal Courts, therefore, do not have subject matter jurisdiction of this action.

POINT VI.

The plaintiffs and all of the defendants are not citizens of different states; therefore the Federal Courts do not have jurisdiction of this action on the grounds of diversity of citizenship.

The amended complaint in this action, paragraph "Second: (a) 1, 2(b) 1-9," (C-1), shows that all of the plaintiffs and, all of the defendants are citizens of the State of New York except the defendant Gordon, a citizen of New Jersey.

The fact that defendant Gordon is a citizen of New Jersey does not confer jurisdiction of this action on the Federal Courts on the ground of diversity of citizenship.

U.S.C.A. Title 28, Section 1332;
Carl Gutmann & Co. v. Rohrer Knitting Mills, 9 F. R. D. 67;
Baltimore & Ohio Railroad Co. v. City of Parkersburg, 268 U. S. 35, 38, 69 L. Ed. 834;
Schuckman v. Rubenstein, 164 F. 2d 952, 955 (CCA 6—1947);
Wells v. Universal Pictures Co., 166 F. 2d 690, 691 (CCA 2d—1948).

In *Carl Gutmann & Co. v. Rohrer Knitting Mills (supra)* the Court said at page 68 of its opinion:

> "As to the fourth cause of action based upon conspiracy, there is a further difficulty. The only ground of jurisdiction here is diversity of citizenship. The complaint shows that the plaintiff and one of the defendants (Warr-Ell Mills, Inc.) are both corporations of and doing business in the State of New York. Where, as here, the plaintiff and one of the defendants are citizens of the same State, the Federal District Court is without jurisdiction. *Shuckman v. Rubenstein*, 6 Cir., 164 F. 2d 952; *Wells v. Universal Pictures Co.*, 2 Cir., 166 F. 2d 690."

Therefore the Federal Courts do not have jurisdiction of this action and the complaint should be dismissed.

CONCLUSION:

For all the foregoing reasons the judgment dismissing plaintiffs' amended complaint and the post judgment orders were correct and certiorari should be denied.

Respectfully submitted,

JOHN J. BOYLE,
Attorney for Respondents The Title Guarantee Company, John C. O'Malley and County Dollar Corporation,
120 Broadway,
New York, N. Y. 10005
212 CO 7-2231.

APPENDIX.

Notice of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAUL STAMBLER and ROSE STAMBLER, individually and SAUL STAMBLER on behalf of Prudential Operating Co., Inc., and Empire Park, Inc., and ROSE STAMBLER on behalf of Empire Park, Inc. (a defunct corporation),

Plaintiffs,

against

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AUSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

Defendants.

SIRS:

Please Take Notice, that upon the amended complaint of plaintiffs, the affidavit of John C. O'Malley, sworn to December 12th, 1968, the affidavit of Herman Berniker, sworn to December 12th, 1968, and upon Exhibits 1, 2, 3, 4, 5 and 6 submitted to the Court herewith, and upon all papers, pleadings and proceedings heretofore had in the above entitled action, the undersigned will duly move this Court at a Term for Motions thereof to be held in the United States Court House, Room 506, Foley Square, Borough of Manhattan, City and State of New York, on the 14th day of January, 1969, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for: (1) summary judgment against the plaintiffs and in favor of the defendants, The Title Guarantee Com-

pany, John C. O'Malley and County Dollar Corporation, dismissing plaintiffs' amended complaint on the merits; (2) dismissing plaintiffs' amended complaint on the further ground that the facts pleaded in said complaint fail to state a claim for relief; (3) dismissing said amended complaint on the further ground that this Court does not have jurisdiction of the subject matter of the action and that the judgment of the State Court sought to be vacated and set aside is *res adjudicata* and not subject to review, stay, modification or vacatur by this Court; (4) dismissing said amended complaint on the further ground that the Court does not have jurisdiction of the parties to this action by reason of want of diversity of citizenship; (5) enjoining the plaintiffs from further proceeding with this action and the imposition of sanctions against them, and (6) for such other, further and different relief as to this Court seems just and equitable.

Dated: December 12th, 1968.

Yours, etc.

JOHN J. BOYLE,
Attorney for Defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation
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120 Broadway
New York, N. Y. 10005
Telephone: 212 CO 7-2231

Notice of Motion

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Affidavit of John C. O'Malley in Support of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAUL STAMBLER and ROSE STAMBLER, individually and SAUL STAMBLER on behalf of Prudential Operating Co., Inc., and Empire Park, Inc., and ROSE STAMBLER on behalf of Empire Park, Inc. (a defunct corporation),

Plaintiffs,

against

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

Defendants.

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State of New York,
County of New York, ss:

JOHN C. O'MALLEY, being duly sworn, deposes and says:

I am an attorney-at-law and a member of the law firm of O'Malley & Boyle, with offices at 120 Broadway, New York, N. Y. 10005, and I make this affidavit in support of this motion for summary judgment herein and a dismissal of the amended complaint on all of the grounds set forth in the answer of defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation, to the said amended complaint.

I am one of the defendants in the above entitled action and I am fully familiar with said action and with the pleadings and proceedings heretofore had therein. It appears from the amended complaint in this action that it is brought to recover a judgment (a) declaring the State

Court actions of Wasylee v. Stambler (Action #1), Prudential v. Wasylee (Action #2), and County Dollar Corporation v. Empire Park, Inc. (Action #3) enumerated in Exhibit 1 hereto annexed a nullity; (b) for a permanent injunction enjoining the enforcement of the State Court's judgment; and (c) for the recovery of astronomical damages against all of the defendants.

As far as can be ascertained from the allegations of the amended complaint the basis for such relief is that the defendants corruptly conspired in the State Court actions with Mr. Justice Dillon, before whom said consolidated actions were tried, to obtain an improper judgment, which violated plaintiffs' civil and constitutional rights under Title 28 U. S. C. Section 1331, 1332, 1343, 2201 and 2202; Title 42 U. S. C. Sections 1981, 1982, 1983, 1985, 1986 and 1994, and the Constitution of the United States, in particular, Article 1 Section 10 and the Fifth, Sixth, Thirteenth and Fourteenth Amendments thereto.

There is no merit to plaintiffs' claims herein or any facts to support such claims.

I am fully familiar with the consolidated actions of Wasylee v. Stambler, Prudential Operating Co., Inc. v. Wasylee and County Dollar Corporation v. Empire Park enumerated in Exhibit 1, having tried said actions in the Supreme Court, Westchester County and handled the appeals therein in the Appellate Division and in the Court of Appeals for the defendants, County Dollar Corporation and New England Mutual Life Insurance Company.

The consolidated actions Wasylee v. Stambler, Prudential Operating Co., Inc. v. Wasylee, and County Dollar Corporation v. Empire Park, Inc., were tried before Mr. Justice John J. Dillon in the Supreme Court, Westchester County for approximately nine days and resulted in a judgment entered in the Westchester County Clerk's Office on April 22, 1965, determining title to a gore tract of real property located in Westchester County adversely

to plaintiffs and in addition thereto granting judgment for $15,106.30 to Peter Wasylee against Saul Stambler, Rose Stambler, Prudential Operating Co., Inc. and Empire Park, Inc. This judgment was unanimously affirmed by the Appellate Division of the Supreme Court, Second Judicial Department, by its order entered June 12, 1967 and the appeal therefrom to the Court of Appeals on constitutional grounds was dismissed by that Court's order entered on November 2, 1967 "upon the ground that no constitutional question is involved".

There will be submitted to the Court on the argument of this motion the Record On Appeal in said consolidated State Court actions in the Appellate Division, marked Exhibit 2, the Stambler group brief, marked Exhibit 3, and the brief of County Dollar Corporation to the Appellate Division, marked Exhibit 4. Said Record on Appeal contains a complete transcript of the proceedings before Mr. Justice Dillon, the pleadings, the decision and the judgment of the State Court in the consolidated actions.

Saul Stambler, Rose Stambler, Prudential Operating Co., Inc. and both the Empire Parks Inc. were represented from the very inception of said State Court actions by Leon J. Greenspan, Esq., of White Plains, New York. On the trial before Judge Dillon, Prudential Operating Co., Inc. and Empire Park, Inc. were represented by Hyman Hecker, Esq. of counsel of White Plains, and the Stamblers were represented on said trial by Leon J. Greenspan, Esq. On the appeal to the Appellate Division Mr. Greenspan continued to represent the Stamblers and Hyman Hecker represented the Empire Parks up to the actual call of the appeal for argument before the Appellate Division on May 4, 1966 when Mr. Greenspan withdrew because of derogatory remarks made about him in a reply brief filed purportedly without his knowledge by Mr. Stambler. The appeal was then adjourned to permit Mr. Stambler to obtain other counsel. There-

after, Rene H. Kursten appeared on said appeal for the Stumblers, the Empire Parks and Prudential (the plaintiffs in this action). Mr. Kursten continued to represent all of said parties until the final disposition of the actions by the dismissal of the appeal in the Court of Appeals on November 2nd, 1967.

Saul Stumbler took an active part in all of the State Court ligitation. He appeared in court on the argument of almost all the pre trial motions and calendar calls, he attended most of the examinations before trial at which approximately 658 pages of testimony were taken. Stumbler's examination alone covered 285 pages of testimony. He was present throughout the trial and continually conferred with and advised his attorneys, Mr. Greenspan and Mr. Hecker. He also appeared in the Appellate Division.

Not once at any time either during the trials or appeals did he raise any question of a conspiracy between Judge Dillon and the other defendants in this action to obtain a corrupt judgment on the trial of the State Court actions in contravention of his civil and constitutional rights. Only after he had exhausted without success all actions and appeals in the State Courts did he come forward with the conspiracy charge set forth in the original complaint in this action claiming a violation of the civil and constitutional rights of the plaintiffs.

The State Court Actions

Action #1, Peter Wasylee v. Saul Stumbler, *et al.*, (Ex. 1), originally was brought to recover back the sum of $15,000 from Saul Stumbler, Rose Stumbler, Jack Jacobs and Prudential Operating Co., Inc. which sum had been paid by Wasylee to the Prudential on June 26th, 1961 for a gore piece of property purportedly running through the property owned by Wasylee. (Stumbler and his group controlled Prudential). The complaint in action #1 was

thereafter amended to bring in the Finke Group of defendants. The amended complaint (appearing at page 24 in Volume 1 of Ex. 2) in addition to seeking to recover the $15,000 from Prudential asked that Empire Park, Inc., if it were successful in establishing title to the gore strip through County Dollar's property in the County Dollar action be adjudged to hold title thereto in trust for Wasylee and that Empire Park be directed to convey it to Wasylee and for other relief.

Action #2, Prudential Operating Co., Inc. v. Peter Wasylee, (Ex. 1), was brought to rescind the conveyance of the gore area purportedly running through the Wasylee property which Wasylee had purchased for $15,000 from Prudential and which Wasylee was suing to recover in action #1. Prudential also asked (in Action #2) to have set aside a simultaneous conveyance by Wasylee of the gore area and other property to the defendants S. & H. Building Corp. on June 26th, 1961 and to have declared void a mortgage thereon held by the defendant New England Mutual Life Insurance Company and also for an accounting of the rents, issues and profits of said gore strip and other relief. The complaint in said action appears at page 83 of Volume 1 of Exhibit 2.

Action #3, County Dollar Corp. vs. Empire Park, Inc. and Peter Wasylee, (Ex. 1), was originally brought only against Empire Park, Inc., the purported record owner and also claimed owner of the purported gore area where it ran through County Dollar's Cross County Center property. The action was brought under Article 15 of the Real Property Law to bar all claims of Empire Park, in and to any part of County Dollar's property. After Wasylee amended his complaint in action #1 claiming that Empire Park, Inc. held the gore strip of property including the portion through County Dollar's property in trust for him, County Dollar amended its complaint to bring Wasylee into action #3 and to bar his purported claim against County Dollar's property that he alleged in

the amended complaint in action #1. County Dollar's amended complaint appears at page 116 of Volume 1 of Exhibit 2. Both Wasylee and Empire Park counterclaimed against County Dollar claiming ownership of the gore area where it purportedly ran through County Dollar's property.

The aforesaid facts cannot be successfully controverted. They are established by the pleadings and minutes of the trial of the consolidated actions before Judge Dillon contained in Exhibit 2 submitted to the court herewith. Said Exhibit 2 further conclusively establishes that (1) that no constitutional question and no law of the United States was in any way involved in said consolidated actions; (2) that all of said actions involved the common question of the existence and the ownership of the purported gore area running through the Wasylee and the County Dollars properties; and (3) the right of Wasylee to recover the $15,000 paid to Prudential for a portion of said gore area and (4) the further right of Wasylee to a judgment that the Stambler group held the balance of said gore area in trust for Wasylee.

The Consolidation of the State Court Actions

The State Court actions 1, 2 and 3 (Ex. 1) were consolidated after motions duly made in open court. They were properly consolidated as the issues in all actions revolved around the existence and the title of the gore area and as to who was the true owner of the various parts thereof, issues common to all actions.

Setting the State Court Actions Down For Trial

By order to show cause returnable June 5, 1964 County Dollar Corporation moved to strike the County Dollar action #3 (Ex. 1) from the calendar on the ground that it had been improperly placed on said calendar before a pretrial proceedings had been completed. As a result of

this motion Hon. Gerald Nolan, Justice of the Supreme Court, directed that said action be placed on the September 1964 calendar of Special Term, Part II of the Westchester County Supreme Court for trial. Actions 1 and 2 (Ex. 1) having been consolidated with the County Dollar action #3, therefore, came on for trial with the County Dollar action on the call of the calendar on September 17th, 1964. The reason the action was tried before Judge Dillon was that he was assigned to Special Term, Part II for September 1964 Term and when the case was called for trial all counsel in actions 1, 2 and 3 answered "ready".

The Trial Before Judge Dillon

The minutes of the trial before Judge Dillon are set forth in Volumes 2, 3 and 4 of Exhibit 2. An examination of this transcript as well as the foregoing facts shows:

(1) That Judge Dillon had full and complete jurisdiction as a Justice of the New York Supreme Court to try and decide all of the issues presented by the pleadings, to wit: (a) the title to the purported gore strip of real property in Westchester County, New York, (b) the rights of the parties to a money judgment against one another, and (c) whether the Stambler group of defendants held title to the purported gore strip of property in trust for Wasylee.

Under such circumstances Judge Dillon had the jurisdiction and the right to make the decision he did and to grant the relief that he granted. Judge Wyatt of this Court in his decision filed in this action on November 8, 1968 has so ruled. He said:

> "The New York Supreme Court, by the Constitution of the State (Art. 6 §1) has 'general jurisdiction in law and equity'. It is thus impossible

for Mr. Justice Dillon with reference to a lawsuit in his court to act in excess of his jurisdiction."

(2) The pleadings and minutes, Exhibit 2, further show that no constitutional question or any question under the laws of the United States were presented for decision in said actions. In fact, plaintiffs in their 47 page brief submitted to Judge Dillon after trial raised no such questions. In the Appellate Division plaintiffs for the first time urged constitutional questions (see plaintiffs-Appellants brief marked Exhibit 3 submitted to the court herewith). They raised the same constitutional questions in the Court of Appeals submitting a copy of their Appellate Division brief in opposition to the motion to dismiss and appeal. Both the Appellate Division and the Court of Appeals unanimously found against plaintiffs and no application was ever made to the Supreme Court of the United States for certiorari and the time to do so has now expired. Therefore, such issues cannot be re-litigated herein.

(3) The pleadings and minutes, as well as the aforesaid facts, further show that plaintiffs had a fair and impartial trial before Judge Dillon. Plaintiffs cannot point to a single ruling or determination made by Judge Dillon during the course of the trial that in fact showed bias on his part in favor of the defendants herein or in any way denied plaintiffs a fair and impartial trial. This is particularly so in view of the Appellate Division's unanimous affirmance.

Judge Dillon's Decision

Judge Dillon's decision is set forth at page 13 of Volume 1 of Exhibit 2. The quoted parts therefrom in the amended complaint (paragraphs 18th to 22nd) are no evidence whatsoever of a corrupt conspiracy between the defendants herein and Judge Dillon or of any wrong do-

ing by the defendants or by the Judge. When Judge Dillon's decision is read as a whole the quoted parts thereof appear in proper perspective and shows that the issues presented by the pleadings were justly and correctly decided on the proof adduced at the trial appearing in the transript Exhibit 2. The affirmance by the Appellate Court makes such a conclusion unassailable, these decisions and judgment of the State Courts cannot be reviewed here because of any of the reasons given by plaintiffs in the amended complaint.

The Conspiracy Charged Against the Defendants

The conspiracy charge made in the amended complaint is false and reprehensible. There is not one factual allegation made in the amended complaint to support it. There are no facts to support it and plaintiffs in this action can supply no facts to support it.

The purported acts of conspiracy are supposedly set forth in paragraphs "Third to Twenty-Fifth" of the amended complaint. There is not one wrongful overt act factually alleged in any of said paragraphs. All contain conclusions of the pleader with nothing to support them. Most do not even allege acts of conspiracy or wrong doing. What was said by Justice Herlands about the original complaint in his decision filed herein on March 28, 1968 denying plaintiffs motion for a temporary injunction is equally applicable to the amended complaint. At page 3 of his decision Judge Herlands said:

> "'The fact that a defeated litigant (in a state court proceeding) is prepared to charge a "conspiracy" recklessly or otherwise and recite . . . . the language of the Civil Rights Act does not give a right of review in the Federal Courts.' *Morgan v. Sylvester*, 125 F. Supp. 380, 387 (S.D.N.Y. 1954), *affirmed*, 220 F. 2d 758 (2nd Cir.) (*per curiam*), *cert. denied* 350 U. S. 867 (1955).

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> Plaintiffs' right to the relief prayed for in the complaint 'is shrouded in substantial doubt'. *Garland v. Ruskin*, 249 F. Supp. 977, 980 (S.D.N.Y. 1965). In fact, there is more than a substantial doubt whether there is subject matter jurisdiction and whether plaintiffs have stated a claim upon which relief can be granted."

Judge Herlands further said at page 6 of his decision:

> "Additional Conclusions
>
> 1. There is no evidence of any violation of any civil rights statutes, e. g., 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1994; nor is there any evidence of any violation of any federal constitutional provision, e. g., the Fifth, Sixth, Seventh, Eighth, Thirteenth and Fourteenth Amendments."

There is clearly nothing pleaded in the amended complaint showing violation of any of the civil rights statutes or constitutional provisions by any of the defendants or any conspiracy by any of the defendants to deprive plaintiffs of their civil or constitutional rights. In this aspect of the amended complaint what was said by Judge McGohey in his decision filed herein on July 13, 1968 granting summary judgment dismissing the original complaint of plaintiffs against Judge Dillon is applicable to the amended complaint and to all of the defendants. At page 7 of his decision Judge McGohey said:

> "Sections 1981 and 1982 of Title 42 U.S.C. both provide for equality of rights regardless of color. Here it is neither alleged nor shown that Justice Dillon discriminated against any plaintiff because of color. Accordingly, the complaint fails to state a claim against Justice Dillon on which relief

may be granted under either of these sections.

Section 1986 which grants only an action for damages, likewise affords no basis for a relievable claim since no claim for damages is asserted against Justice Dillon.

There remains to be considered the claimed conspiratorial deprivation of the plaintiffs' rights by Justice Dillon. Whether such a claim may be laid under sections 1983 and 1985 of Title 42 need not be decided here for in any event the complaint fails to allege sufficient facts to show that Justice Dillon was part of any such conspiracy if one existed.[5] The complaint does no more than charge Justice Dillon in the most general terms with participation in the alleged conspiracy. This is not enough.[6] Apart from the allegations which will be considered later that Saul Stambler was 'convicted' and subject to 'involuntary servitude,' the complaint shows only that the judge performed the normal duties of his office in the trial and decision of the issues in a strongly contested litigation.

The claims of 'conviction' and 'involuntary servitude' are, as the complaint on its face shows, frivolous and must be disregarded.[7]

The motion, treated as one for summary judgment, is granted.

I unequivocably swear that there was no conspiracy between the defendants in this action to unjustly de-

[5] *Arnow v. City of Coldspton*, 239 F. 2d 226, 230 (9th Cir. 1957).

[6] *See Powell v. Workmen's Compensation Board of the State of New York*, 327 F. 2d 131, 137 (2 Cir. 1964).

[7] *See Jemzura v. Beldon*, 67 Civ. 347 N.D.N.Y. 1968).

prive the plaintiffs of their civil and constitutional rights in the State Court actions. Except for arguments in open court or in the presence of other counsel, I never discussed the State Court actions or any aspects thereof with Judge Dillon and I never did anything or counseled the doings of any acts which would deprive plaintiffs of their civil or constitutional rights. I defy the plaintiffs to point out any overt act on my part or on the part of any defendant to the contrary. The Record on Appeal in the State Court actions (Ex. 2) conclusively shows that plaintiffs were not deprived of any of their civil or constitutional rights by Judge Dillon or any of the other defendants to this action.

The County Dollar Action Against Empire Park, Inc. Was Not Conspiratorial or Wrongful.

The commencement and maintenance of the County Dollar action against Empire Park, Inc. (Ex. 1) was not an act of conspiracy with the other defendants to deprive plaintiffs of their civil and constitutional rights.

The County Dollar action was commenced because of the conduct of plaintiff Stambler and his attorney Leon J. Greenspan. On July 9, 1962 Mr. Greenspan wrote County Dollar Corporation threatening to erect a fence across the entrance to a service station built upon a portion County Dollar's property. A copy of his letter is hereto annexed and marked Exhibit 5. County Dollar's title to its property had been insured by the title company for $22,500,000. The meeting referred to in paragraph "Thirteenth" of the amended complaint was to forestall the erection of the fence if possible and explore the possibility of settlement of Empire claims against County Dollar. What transpired at said meeting is entirely different from what is alleged in paragraph "Thirteenth" of the amended complaint, as ap-

pears from the affidavit of Herman Berniker hereto annexed.

After said meeting The Title Guarantee Company pursuant to its title policy insuring County Dollar's title retained my firm to bring a bar claim action to protect County Dollar from Stambler's threatened action of erecting a fence and to dispose of his invalid claim against the County Dollar property. When Stambler did try to erect a fence by placing poles in the County Dollar's property on September 14, 1964 (which poles were immediately removed by County Dollar) the County Dollar action was commenced and on due application to the Court Judge Joseph F. Gagliardi issued a temporary injunction restraining Empire Park, Inc. and its representatives from disturbing the *status quo* during the pendency of such action.

The County Dollar action was commenced without consultation with any of the defendants or their counsel all of whom were unknown to me and my firm at that time. Plaintiffs claim that it was brought as a part of a conspiracy to deprive plaintiffs of their civil and constitutional rights is false and has no facts whatsoever to support it. Likewise, plaintiffs claim that defendants, County Dollar Corporation, The Title Guarantee Company and deponent induced plaintiff Wasylee to amend his complaint in action #1 (Ex. 1) to enlarge his claim against plaintiffs is false.

I did not request Mr. Wasylee or his attorneys, Avstreih, Martino & Weiss, Esqs., and I know that County Dollar Corporation and the Title Guarantee Company did not request Mr. Wasylee or his attorneys to amend Wasylee's complaint against Stambler in action #1 (Ex. 1), to include additional claims against the Stambler group. I did not participate in and I know that County Dollar and The Title Guarantee Company did not participate in any deliberations leading up to said amended complaint.

What is more, any such counselling, even if admitted, is in no way conspiratorial, is not wrong and does not deprive plaintiffs of their civil or constitutional rights. The important thing is what transpired on the trial of this action before Judge Dillon. The Record on Appeal (Ex. 2) shows conclusively the plaintiffs represented by counsel of their own choice had a fair and impartial trial.

Nor is there any thing wrong or conspiratorial with County Dollar's amendment of its action #3 (Ex. 1) to bring in Peter Wasylee as a party defendant. When Wasylee amended his complaint in action #1 (Ex. 1) against Stambler claiming that if Stambler and his associates had title to the gore area through County Dollar's property they held it for Wasylee's benefit, it was a requisite step in the proper conduct of the County Dollar's action to amend its complaint to bar such claims of Wasylee.

Conclusion

Plaintiffs have not alleged nor can they establish any factual overt acts showing that defendants either conspired or did anything to deprive plaintiffs of their civil or constitutional rights in the State Court litigation. They have had an adequate opportunity to do so. This action was commenced by the filing of the complaint on February 8th, 1968. On October 7, 1968 after motions by defendants to dismiss the complaint, Judge Tenney, by his order dated that day, granted leave to plaintiffs to serve an amended complaint against all defendants even including Judge Dillon. Plaintiffs present amended complaint was not served until December 3rd, 1968 by mail. Plaintiffs have had more than adequate time either to obtain counsel to draw or themselves to draw an adequate amended complaint if such

complaint could be drawn. The facts above show that an adequate complaint cannot be drawn and further show that summary judgment dismissing said amended complaint on the merits should be granted.

Plaintiffs conduct in instituting and continuing this action is nothing but harassment and the wasting of the time of this court. It should be judged in the light of what Judge Wyatt said in his decision herein filed November 8, 1968 denying plaintiffs motion to examine Judge Dillon before trial to enable plaintiffs to amend their complaint. On the last page of his decision Judge Wyatt said:

> "The explanation made above establishes that such motions as the present are harassment to all those concerned. The plaintiffs are taking the time of judges of this Court to deal with essentially frivolous matters to the prejudice of other litigants in this Court. Plaintiffs are strongly advised to desist in such conduct. Continuance can only lead to the imposition of sanctions or the entry of an injunction against plaintiffs or both."

This harassment of defendants by plaintiffs and the waste of time of litigants and the Court should be stopped now. Summary judgment should be granted dismissing plaintiffs' amended complaint on the merits.

All of the plaintiffs and all of the defendants to this action are citizens and residents of the State of New York except the defendant, Gordon who is a citizen of the State of New Jersey. Plaintiffs allege and admit this. Therefore, there is not complete diversity of citizenship sufficient to confer jurisdiction on this Court.

This action was originally brought by Rene Harry Karsten, Esq., an attorney whose office address is now 5 Beekman Street, New York City, New York. Plain-

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tiffs, Stambler, claim that Mr. Karsten has been relieved as their attorney because of ill health but there is nothing of record or served on the attorney for County Dollar Corporation, The Title Guarantee Company and John C. O'Malley, by the corporate plaintiffs relieving Mr. Karsten as their attorney. For that reason notice of this application has been given to Mr. Karsten.

No other application has been made for this or similar relief.

Wherefore, defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation ask that summary judgment be granted herein in their favor dismissing plaintiffs' amended complaint on the merits with costs.

JOHN C. O'MALLEY

Sworn to before me this
12th day of December, 1968.
IRWIN J. WEINSTEIN
Notary Public, State of New York
No. 44-4198775
Qualified in Queens County
Term Expires March 30, 1969

Exhibit 5. Annexed to Affidavit of John C. O'Malley.

LEON J. GREENSPAN

Attorney and Counsellor at Law

199 Main Street

White Plains, N. Y.

WHite Plains 8-1422

Tarrytown Office

154 Martling Avenue

Tarrytown, N. Y.

MEdford 1-1131

August 9, 1962

County Dollar Corporation
25 Milk Street
Boston, Mass.

Gentlemen:

The undersigned has been retained by Empire Park, Inc. with addresses at 199 Main Street, White Plains, N. Y., and c/o Leon J. Greenspan, Esquire. My client has authorized me to instruct you that in order to prevent further trespass it will have no alternative other than to erect a fence which will, unfortunately, block access to the service station.

Enclosed please find survey substantiating ownership of the gore upon which the service station is encroaching and trespassing.

Very truly yours,

LEON J. GREENSPAN

Encs.
LJG:bv

Exhibit 1, Annexed to Affidavit of John C. O'Malley.

SUPREME COURT,

WESTCHESTER COUNTY.

Action No. 1—Index No. 4644/1962

PETER WASYLEC,

Plaintiff-Respondent,

against

SAUL STAMBLER, ROSE STAMBLER, PRUDENTIAL OPERATING Co., Inc. and EMPIRE PARK, Inc., a domestic corporation which was dissolved and EMPIRE PARK, Inc., a domestic corporation,

Defendants-Appellants,

JACK JACOBS, S & H BUILDING CORP., MARCY FINKE, individually, MARCY FINKE, HERBERT TANNENBAUM, DOROTHY RUBIN, DAVID JACOBS and JACK HIRSCH, doing business as S & H Building Co.,

Defendants.

Exhibit 1, Annexed to Affidavit of John C. O'Malley

Action No. 2—Index No. 7840/1962

PRUDENTIAL OPERATING Co., Inc.,

Plaintiff-Appellant,

against

PETER WASYLEC and CROSS-THRU CORPORATION,

Defendants-Respondents,

S & H BUILDING CORP., COSMOPOLITAN EQUITIES, Inc., CROSS-THRU CORPORATION, NEW ENGLAND MUTUAL INSURANCE Co., THE GREAT ATLANTIC & PACIFIC TEA Co., and DOROTHY RUBIN, HERBERT TANNENBAUM, MARCY FINKL, DAVID JACOBS and JACK HIRSCH, doing business as S & H Building Co., a co-partnership,

Defendants.

Action No. 3—Index No. 9934/1962

COUNTY DOLLAR CORPORATION,

Plaintiff-Respondent,

against

EMPIRE PARK, Inc. and PETER WASYLEC,

Defendants-Appellants.

Affidavit of Herman Berniker.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAUL STAMBLER and ROSE STAMBLER, individually *et al.*,

Plaintiffs,

against

JOHN J. DILLON, *et al.*,

Defendants.

State of New York,
County of New York, ss:

HERMAN BERNIKER, being duly sworn, deposes and says I am president of the defendant, The Title Guarantee Company and have my office at said defendant's principal place of business located at 120 Broadway, New York City, N. Y. 10005.

I have read the amended complaint of plaintiffs. Paragraph "Thirteenth" thereof is not true. On August 27, 1962 I did meet with Mr. Stambler and Leon J. Greenspan, Esq., his attorney, in Mr. Greenspan's office at White Plains, New York. Immediately following such meeting I made a written memorandum of what transpired at the meeting. A copy of such memorandum marked Exhibit 6 is hereto annexed. The memorandum accurately sets forth the substance of what took place at such meeting and it is in all respects true and correct.

I did not state or offer at such meeting on August 27, 1962 or at any other time or place to procure a discontinuance of the action Wasylec v. Stambler, *et al.* (Action #1, Ex. 1) in return for a deed to the pur-

ported gore area through the County Dollar property. Nor did I or The Title Guarantee Company ever conspire with the defendants or any of them in this action to do anything to deprive plaintiffs of their civil or constitutional rights, nor have I or The Title Guaranty Company ever done anything in the course of State Court litigation herein to prejudice or deprive plaintiffs of their civil or constitutional rights.

HERMAN BERNIKER

Sworn to before me this
12th day of December, 1968.
IRWIN J. WEINSTEIN
Notary Public, State of New York
No. 41-4198775
Qualified in Queens County
Term Expires March 30, 1969

Exhibit 6, Annexed to Affidavit of Herman Berniker.

On August 27, 1962, Mr. Blanco and I called at the offices of Leon J. Greenspan, 199 Main Street, White Plains, New York. Mr. Greenspan said he represented Mr. Stambler (who was present) who is the President of Empire Park Inc. allegedly the owner of a strip which appears to be a "no man's land" lying between two filed maps (1) known as the Pease Estate Map and the other the Empire State Park Subdivision. Also present were Mr. Huck, who is a lawyer and agent for County Dollar Corp., our insureds and the present owners of the Cross County Center. Mr. Geoffrion of the City Title joined the meeting by invitation from Mr. Bianco. Messrs. Stambler and Greenspan stated that unless we were to commence an action against our insured under Policy No. 6080717 (the A & P Parcel) for recision of the policy on the ground of fraud they would erect a fence across the gasoline station site in the Cross County Center. If we would "co-operate", they would "co-operate" with regard to perfecting the title to the Cross County Center Parcel. We made it clear that no such action could or would be taken based on their allegations of fraud stated; and added that we would be interested in acquiring the "outstanding interest" for a sum which would represent the cost of our bringing an action to bar their claim. They answered by saying that the property was not for sale. After considerable discussion Mr. Stambler agreed that he would not erect a fence upon the understanding that we would promptly bring an action to test the question of title to the "no man's land." I indicated that we would arrange to have our Counsel commence work on the preparation of the Complaint.

Earlier in the day, I called Mr. Saul Fromkes of City Title, which Company has co-insured the Cross County Center to advise him of the meeting. I also suggested that Mr. Geoffrion communicate with Mr. Fromkes and give him a report of what happened at the meeting.

Exhibit 6, Annexed to Affidavit of Herman Berniker

P. S. Mr. Stambler called after the conference. He insisted that the Complaint allege that a fence has been erected. Answer "We could not do that. We have no objection to alleging the erection of the fence is threatened." Mr. Stambler said that he will put a post or two on each side of it.

P. P. S. Mr. Greenspan called after Mr. Stambler's last conversation with Mr. Berniker and stated to me that his client was proceeding with the erection of a fence on Wednesday. Tried to contact Mr. Huck but he was not in. Left word that we called and will try again tomorrow.